



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-S- INC

DATE: MAY 30, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an engineering consultation business, seeks to employ the Beneficiary as an applications engineer. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition on the ground that the minimum educational and experience requirements of the labor certification did not support the requested classification of advanced degree professional.

On appeal, the Petitioner asserts that the terms of the labor certification are not controlling in our adjudication of the petition, that the actual minimum requirements of the proffered position qualify it for advanced degree professional classification, and that the Beneficiary meets these requirements. Alternatively, the Petitioner requests that the petition be approved for classification of the Beneficiary as an “EB-3” professional.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. The Roles of the DOL and USCIS in the Employment-Based Immigrant Visa Process

A U.S. employer’s sponsorship of a foreign national for lawful permanent residence is a three-part process. First, an employer obtains an approved labor certification (ETA Form 9089, Application for Permanent Employment Certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); *see also* 20 C.F.R. § 656 *et seq.* The labor certification states the job duties of the position, its education, training, experience, and other requirements, as well as the proffered wage and work location(s). The DOL’s role in certifying the labor certification is set forth at section 212(a)(5)(i) of the Act. The DOL’s certification affirms that, “there are not sufficient [U.S.] workers who are able, willing, qualified . . . and available” to perform the job where the beneficiary will be employed, and that “the employment of such [beneficiary] will

not adversely affect the wages and working conditions of workers in the United States similarly employed.” See section 212(a)(5)(A)(i)(I) and (II) of the Act, and section O of the labor certification. Following labor certification approval, a petitioner files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the required 180 day labor certification validity period. See 20 C.F.R. § 656.30(b)(1); 8.C.F.R. § 204.5. USCIS then examines whether: the petitioner can establish its ability to pay the proffered wage, the petition meets the requirements for the requested classification, and the beneficiary has the required education, training, and experience for the position offered and the classification requested. See 8 C.F.R. § 204.5. Finally, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

Thus, it is the DOL’s responsibility to determine whether there are qualified U.S. workers available to perform the job offered, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine whether the minimum job requirements under the terms of the labor certification support the requested visa classification and, if so, whether the beneficiary meets those minimum requirements.

B. Eligibility for Classification as Advanced Degree Professional

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. See also 8 C.F.R. § 204.5(k)(1). The regulation at 8 C.F.R. § 204.5(k)(2) defines “advanced degree” as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that the job offer portion of the labor certification that accompanies a petition for advanced degree professional classification must require a professional holding an advanced degree. The regulation reads, in pertinent part, as follows:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent

Therefore, to make a job eligible for classification as an advanced degree professional the labor certification must require either (1) a U.S. master’s degree or a foreign equivalent degree, or (2) a U.S. bachelor’s or a foreign equivalent degree plus five years of qualifying experience.

II. ANALYSIS

A. Labor Certification Does Not Support Requested Classification

The Petitioner indicated on the Form I-140 (in Part 2, item 1.d) that the petition was being filed for an advanced degree professional. The accompanying labor certification¹ set forth (in section H) the following requirements for the proffered position of applications engineer:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Engineering
5.	Is training required for the job opportunity?	No
6.	Is experience in the job offered required?	Yes
6-A.	If so, how long?	12 months
7.	Is an alternate field of study acceptable?	No
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	No

As stated in the labor certification, the minimum requirements for the proffered position are a bachelor's degree in engineering and 12 months of experience in the job offered. Since the labor certification does not require either a master's degree or a bachelor's degree and five years of qualifying experience it does not support the requested classification of advanced degree professional.

On appeal the Petitioner does not dispute the minimum educational and experience requirements of the labor certification, but asserts that the labor certification is not controlling as to whether the job offered requires a master's degree or a bachelor's degree and five years of qualifying experience. The Petitioner asserts that USCIS is not bound by the terms of the labor certification, but may consider other information regarding the requirements of the position and make its own determination as to the minimum requirements of a position and whether the Beneficiary meets them. According to the Petitioner, the Director's decision did not determine whether the Beneficiary's qualifications met the requirements of the proffered position, in accordance with the USCIS adjudication manual, and did not incorporate an independent inquiry about the actual requirements of the proffered position. In essence, the Petitioner claims that the job offered requires an advanced degree – either a master's degree or a bachelor's degree and five years of qualifying experience – so USCIS should ignore the lesser minimum requirements stated by the Petitioner on the labor certification. We do not agree.

¹ The date the labor certification was filed with the DOL, in this case May 20, 2016, is the "priority date" of the petition. The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

The Petitioner misconstrues the grounds for the Director's denial of the petition. The minimum educational and experience requirements of the labor certification determine what employment-based classification can be requested in the petition. Regardless of the Beneficiary's individual qualifications, therefore, this petition for advanced degree professional classification cannot be approved if the minimum job requirements as stated on the labor certification are not at least a master's degree or a bachelor's degree and five years of qualifying experience. In this case, the labor certification requires only a bachelor's degree and one year of qualifying experience. As such, it does not support the requested classification of advanced degree professional.

On appeal, the Petitioner does not dispute that its requirements on the DOL-certified labor certification allow applicants to qualify with less than an advanced degree. Rather, the Petitioner contends that, despite its statement on the labor certification that the offered position only requires a bachelor's degree and one year of experience, its petition should be approved because the position of applications engineer actually requires either a master's degree or a bachelor's degree and five years of experience. The Petitioner asserts that it does not employ anyone as an applications engineer without such qualifications, and that these requirements are the industry standard for applications engineers. Even if these contentions were true,² they would not overcome the fact that this petition is not approvable for the requested classification of advanced degree professional because the labor certification that accompanies it only requires a bachelor's degree and one year of experience.

In determining the minimum requirements of a proffered position, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. See *Rosedale Linden Park Company v. Smith*, 595 F.Supp. 829, 833 (D.D.C. 1984). Our interpretation of the job's requirements must involve reading and applying the plain language of the labor certification application form. *Id.* at 834. As discussed above, the labor certification in this case requires a bachelor's degree and one year of qualifying experience, which are less than the minimum requirements for advanced degree professional classification. Accordingly, the labor certification does not support the requested classification of advanced degree professional, as required by 8 C.F.R. § 204.5(k)(4)(i).

Finally, the Petitioner asserts that the petition should be approved for the alternative classification of "EB-3" professional because the Beneficiary has the requisite educational degree and qualifying experience to meet the terms of the labor certification and qualify for professional classification.³ A

² The supporting materials submitted on appeal do not support the Petitioner's claim that applications engineers always require either a master's degree or a bachelor's degree and five years of experience. The Petitioner submits biographical synopses of five applications engineers in its employ which attest to their extensive experience but do not mention their academic credentials. While the Petitioner submits a job advertisement it posted for an applications engineer which requires a master's degree or a bachelor's degree and five years of experience, three out of four job advertisements it submits from other companies have lesser requirements. One requires an engineering degree or five years of experience, not both, and two allow for equivalent work experience to substitute for a bachelor's degree.

³ Section 203(b)(3)(A)(ii) of the Act provides that immigrant visas may be granted to professionals with baccalaureate

petition may only be approved, however, for the classification requested on the petition. The classification requested on this petition is advanced degree professional. A petitioner may not make a material change to a petition on appeal in an effort to cure a deficiency and make it approvable. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

B. Requirements of the Labor Certification

Beyond the decision of the Director, the record does not establish that the Beneficiary meets the minimum experience requirement of the labor certification. In addition to meeting the minimum documentary requirements of 8 C.F.R. § 204.5(k)(3)(i)(A) and (B) to qualify for classification as an advanced degree professional based on education or a combination of education and experience, a beneficiary must also meet any other training or experience requirements of the labor certification. See 8 C.F.R. § 204.5(k)(4)(i). The record shows that the Beneficiary has a four-year Bachelor of Technology in Chemical Engineering from the [REDACTED] in [REDACTED], India, earned in the years 2003-2007, and a two-year Master of Science in Engineering from the [REDACTED] earned in the years 2007-2009. Thus, the Beneficiary meets the minimum educational requirement for advanced degree professional classification. In this case, however, the labor certification also requires 12 months of experience as an applications engineer, and states at section J, item 21, that the Beneficiary did not gain any of his qualifying experience with the employer (the Petitioner) in a substantially comparable position to the job offered in this proceeding. Thus, it appears that the only qualifying experience for the Beneficiary listed on the labor certification is the 16 months of alleged employment as an applications engineer with [REDACTED] in [REDACTED] Indiana, from May 2014 through August 2015. But there is no corroborating evidence of this employment in the record. Specifically, there is no letter from [REDACTED] confirming the Beneficiary's job duties and dates of employment. Thus, the record does not establish that the Beneficiary meets the experience requirement of the labor certification. For this additional reason the petition cannot be approved.

III. CONCLUSION

The minimum educational and experience requirements of the labor certification do not support the petition's requested classification of advanced degree professional. In addition, the record does not establish that the Beneficiary meets the experience requirement of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of D-S- Inc*, ID# 1412134 (AAO May 30, 2018)